4TH AND 5TH AMENDMENTS SUPPRESSION OUTLINE AND TIPS

AnnMarie Howard

annmarie@juabcounty.com

FOURTH AMENDMENT

I. GENERAL
- a. The Fourth Amendment protects against "unreasonable searches and seizures" by governmental actors of persons, houses, papers, and effects.
- b. Warrants shall have probable cause, supported by oath or affirmation describing with particularity the place to be searched and the persons or things to be seized.
- c. It encompasses both "primary evidence obtained as a direct result of an illegal search or seizure" and "evidence later discovered and found to be a derivative of an illegality," the "fruit of the poisonous tree."
- d. Government action is required

II. SEIZURE
- a. Property: when there is interference with possessory interest in property by a government actor.
- b. Person: when a person's freedom of movement is restrained by means of physical force or a show of authority.
- c. Is the police/citizen encounter a seizure?
  - i. Level One (consensual encounter) – No seizure
    1. Officer may approach a citizen and ask question, the person is not detained against his will and remains free to leave.
  - ii. Level Two (investigative detention/stop) – Temporary seizure
    1. Officer has reasonable, articulable suspicion that a person has committed or is about to commit a crime or traffic offense.
    2. Based upon reasonable suspicion.
  - iii. Level three (arrest) – Seizure
    1. Officer has probable cause to believe a crime has been committed and arrests the suspect.
- d. Scope of detention is limited to purpose of stop. Two part test:
  - i. Officer's action "justified at its inception," and
  - ii. Resulting detention must be "reasonably related in scope to the circumstances that justified the interference in the first place."
    1. Limited scope and duration
- e. "Totality of the circumstances" and reasonableness are key. Case law examples:
  - i. Automobile stops: reasonable suspicion of traffic violation or crime.
    1. *State v. Lopez*, 873 P.2d 1127, 1131 (Utah 1994) (running warrants check during routine traffic stop (failure to signal) permissible as long as did not significantly extend detention period beyond driver's license and valid registration checks).
    2. *State v. Ray*, 2000 UT App. 55 (if retains ID then seizure has occurred)
    3. *State v. Hansen*, 2002 UT 125 (traffic stop can de-escalate to a consensual encounter)
    4. *State v. Biggs*, 2007 UT App 261 (level 2 supported when officer has reasonable suspicion that violating traffic offense of uninsured vehicle)
    5. *State v. Anderson*, 2015 UT 90 (officer's use of overhead lights may constitute seizure
  - ii. Community caretaker – *State v. Anderson*, 2015 UT 90. Two prong test:
    1. Degree to which an officer intrudes upon a citizen's freedom of movement and privacy.
       - a. The "degree of overt authority and force displayed."
       - b. Length of seizure
    2. The degree of the public interest and the exigency of the situation justified the seizure for community caretaking purposes.
  - iii. Frisks: must have reasonable belief suspect is armed and dangerous. *Terry v. Ohio,* 392 U.S. 1 (1968).
  - iv. Police dispatch
    1. *State v. Pena*, 869 P.2d 932, 940 (Utah 1994) (Police officers can rely on a dispatched report in making an investigatory stop as long as the dispatched report contains articulable facts to support a finding of reasonable suspicion.)

2. *State v. Bruce*, 779 P.2d 646, 650-51 (where police broadcast contained other sufficient information and articulable facts to support a reasonable suspicion.)

III. SEARCH

a. Defendant has (1) an actual subjective expectation of privacy in the place or thing searched AND (2) a reasonable expectation of privacy (recognized by society as legitimate). *Katz v. U.S.* 389 U.S. 347 (1967)
b. Reasonable expectation of privacy
    i. Open Field – no reasonable expectation of privacy
    ii. Curtilage— may be a search depending on proximity to the home, enclosures, use, and steps taken to make it private.
    iii. Trash or discarded items – no reasonable expectation of privacy unless in curtilage. *California v. Greenwood*, 486 U.S. 35 (1988).
    iv. Plain Feel/Touch Searches - cannot "manipulate" to determine – must be immediately apparent. *Minnesota v. Dickerson*, 508 U.S. 366 (1993)
        1. Plain View – three points: 1. Officer lawfully present. 2. Item in plain view and incriminating character is "immediately apparent," 3. Officer must have lawful right of access to the object itself. *State v. Naisbitt*, 827 P.2d 969, 973 (Utah App. 1992); *State v. Lee*, 633 P.2d 48, 51 (Utah 1981) (holding officer looking through a vehicle window with a flashlight was lawful).
        2. Thermal imaging of homes –Expectation of privacy but if technology allows police to view in the home what general public could view, might argue less likely a search. *Kyllo v. U.S*., 533 U.S. 27 (2001).
    v. Public Areas – Defendant must present evidence of a legitimate expectation of privacy in the open and non-exclusive area. *State v. Atwood*, 831 P.2d 1056 (Utah Ct. App. 1992) (open and shared parking area).
    vi. Aerial surveillance – *California v. Ciraolo*, 476 U.S. 207 (1986) – not a search
    vii. Canine sniffs: use of a dog to reveal drugs during an otherwise lawful traffic stop does not implicate a reasonable expectation of privacy because it only reveals contraband and does not alter the nature of the stop itself. No expectation of privacy in odor of contraband. *Illinois v. Caballes*, 543 U.S. 405 (2005).
        1. *State v. Wilkinson*, 2008 UT App 395 (time lapse of 6-10 minutes for sniff was not unreasonable delay).
c. Warrantless searches are presumptively unreasonable. The State bears the burden of proving they are reasonable.
d. Warrant searches are presumptively reasonable. Defendant bears the burden of proving otherwise.

IV. REASONABLE SUSPICION

a. Detention or seizure: reasonable suspicion required.
b. "[M]ust be supported by specific and articulable facts and rational inferences, and cannot be merely an inchoate and unparticularized suspicion or hunch," *State v. Markland*, 2005 UT 26, ¶ 10, 112 P.3d 507
c. "In determining reasonableness, 'due weight must be given… to specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience.'" *State v. Warren*, 2003 UT 36, ¶ 14, 78 P.3d
d. Statute: Utah Code § 77-7-15.

V. PROBABLE CAUSE

a. Search: Probable cause to believe there is evidence of a crime therein
b. Seize: Probable cause to believe the item(s) is evidence of a crime
c. Arrest: Probable cause to believe the individual is guilty of a crime
d. Probable Cause for a Warrant to be Issued

VI. INFORMATION IN THE WARRANT

a. Application—probable cause provided through signed affidavits with a specific description of the person/place/things to be searched and seized.
    i. Things to be seized—
        1. Officers supplied adequate information to guide officers in selecting what items to seize
        2. The category of items specified in the warrant cannot be too broad so that it includes articles that should not be seized. *State v. Fuller*, 2014 UT 28, 332 P.3d 937.

b. Issued by a judge or magistrate
    i. Great deference
c. Execution—must be reasonable
    i. Time and place
        1. Limited to scope of warrant
    ii. No-knock allowed if officers have reasonable suspicion knocking and announcing is dangerous or futile; higher standard does not apply where entry results in property damage. *United States v. Ramirez*, 523 U.S. 65 (1998).
    iii. Staleness – "The State correctly argues that in deciding whether probable cause existed for the warrant, we must consider the nature of the evidence sought — i.e., whether such evidence was of the type likely to be kept for a long time." *State v. Decorso*, 993 P. 2d 837 (1999).
d. Good faith exception: where officer reasonably relies on warrant which is later determined to be invalid, seized evidence will not be suppressed. *United States v. Leon*, 468 U.S. 897 (1984)
e. False affidavits: where affidavit contains intentional or reckless false statements/material omissions, excise. *Franks v. Delaware*, 438 U.S. 154 (1978).

VII. WARRANTLESS
a. ARRESTS
    i. UTAH CODE § 77-7-2
        1. In home: arrest warrant unless exigent circumstances
        2. Felony or misdemeanor: no arrest warrant if offense in the presence of the officer
        3. Felony or Class A outside presence of officer: no arrest warrant if probable cause to believe a felony has been committed.
        4. Public offense and probable cause to believe person may: flee or conceal himself to avoid arrest; destroy or conceal evidence of the commission of the offense; or injure another person or damage property belonging to another person.
    ii. "An officer must have probable cause to make an arrest without a warrant." *State v. Trane*, 2002 UT 97, ¶ 26.
b. STOP AND FRISK (TERRY)
    i. Frisk: Reasonable suspicion that the individual poses a danger to the officer
        1. Pat down for weapons
c. SEARCH INCIDENT TO ARREST
    i. First, police must have probable cause to arrest.
    ii. After an arrest, officer can search area within the arrestee's immediate physical control
        1. Automobiles: "When the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when the police could expect to find evidence of the offense for which the arrestee had been arrested. *Arizona v. Gant,* 129 S.Ct. at 1719." *State v. Baker,* 2010 UT 18
        2. Contemporaneous in time and place
        3. Officers can also secure the premises by "sweeping" the area for protection
    iii. After mere issuance of traffic citation, officers may not search incident to arrest. Knowles v. Iowa.

d. PLAIN VIEW DOCTRINE
    i. Officer must have legitimate right to be at location and
    ii. Items viewed must be clearly incriminating. *State v. O'Brien*, 959 P.2d 647 (Utah App. 1998)
        1. BEFORE the evidence is seized

e. PLAIN TOUCH DOCTRINE
    i. Police must be lawfully conducting a stop and frisk AND
    ii. If probable cause is established during such frisk, (the item is evidence of a crime) police may seize the article if the incriminating character of the item is immediately apparent. *Minnesota v. Dickerson*, 113 S.Ct. 2130 (1993).
    iii. If the item is a container, the police can seize the container but must obtain a warrant to open the container

f. AUTOMOBILE EXCEPTION
    i. Federal law: Automobiles can be searched without warrant if automobile is readily mobile and probable cause that it contains evidence of a crime (no longer required exigent circumstance). *Pennsylvania v. Labron*, 518 U.S.938, 940 (1996).

ii. Utah law: Defendant argued lack of exigency under Utah Constitution. Court of Appeals decided that departure from federal rule is the task of the Utah Supreme Court. "[O]fficers were only required to have probable cause to justify the search … under automobile exception to the warrant requirement of either the federal or Utah constitutions." *State v. Rigby*, 2016 UT App. 42

g. EXIGENT CIRCUMSTANCES
   i. Assist persons who are seriously injured or threatened with such injury. *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978). Adequate basis to justify the emergency situation.
      1. "Does not matter whether the officers entered to arrest respondents and gather evidence against them or to assist the injured and prevent further violence." *Brigham City v. Stuart*, 547 U.S. 398 (2006).
   ii. Safety of the public. *Camara v. Mun Ct. of San Francisco*, 387 U.S. 523, 534 (1967).
   iii. Safety of police and risk of loss of evidence. *State v. Larocco*, 794 P.2d 460, 470-71 (Utah 1990).
   iv. Risk of loss of evidence. *State v. Limb*, 581 P.2d 142, 144 (Utah 1978).
      1. Evidence of blood alcohol. "Under the totality of the circumstances, both probable cause and exigent circumstances justified its warrantless blood draw." *State v. Rodriguez*, 156 P. 3d 771 (2007)

h. CONSENT
   i. "A consent is valid only if (1) the consent was given voluntarily, and (2) the consent was not obtained by police exploitation of [a] prior illegality." *State v. Fretheim*, 2015 UT App 197.
   ii. "Consent is not voluntary if it is obtained as 'the product of duress or coercion, express or implied.'" State v. Bisner, 2001 UT 99, ¶ 47, 37 P.3d 1073 (quoting Schneckloth, 412 U.S. at 227) (listing factors indicating a lack of duress or coercion)."
   iii. Scope: When an officer suspects a vehicle may contain narcotics and the driver consents to a search, the officer may search anyplace where narcotics could be stored, including closed containers. Florida v. Jimeno
      1. Defendant can expressly limit the scope of the search either prior to or during the search.
      2. Consent search contemplates a thorough search (especially if looking for contraband) so that the removal of an ashtray and an air vent cover have been held permissible. United States v. Pena.
   iv. "Consent may come from the person whose property is to be searched, from a third party who has common authority over the property, or from a third party who has apparent authority to consent to a search of the property." *State v. Clark*, 2015 UT App 289 (quoting *State v. Harding*, 2011 UT 78, ¶ 10).

i. INVENTORY SEARCHES
   i. Property (Cars, containers, or person) is lawfully taken into custody AND carried out for caretaking functions pursuant to "standardized criteria" or "established routine". *Florida v. Wells*, 495 U.S. 1,4 (1990).
   ii. Policy – (1) protect owner's property, (2) insure police against claims and (3) protect police and community from danger. *State v. Johnson*, 745 P.2d 452 (Utah 1987).
   iii. Containers can be searched if the purpose for the search is a caretaking function, NOT search for evidence "With a standardized, mandatory procedure, the minister's picnic basket and grandma's knitting bag are opened and inventoried right along with the biker's tool box and the gypsy's satchel." *State v. Shamblin*, 763 P.2d 425 (Utah Ct. App. 1988)
   iv. Utah's two-step process:
      1. First, there must be a "reasonable and proper justification for the impoundment of the vehicle." *State v. Hygh*, 711 P.2d 264 (1985).
      2. Second, the inventory search itself must have been "conducted for inventory purposes, in a legal manner, and not merely as a fishing expedition for evidence." *State v. Sterger*
   v. Utah courts have held that a reasonable and proper justification is statutory authorization.
      1. Under Utah law, "any peace officer, without a warrant, may seize and take possession of any vehicle…that is being operated on a highway… with registration that is suspended or revoked." *State v. Strickling.* 844 P.2d 979 (Utah Ct. App. 1992)
      2. If there is not a specific statutory authorization, the officer can still show a "reasonable and proper justification" for impounding the vehicle.

j. ROADBLOCKS
    i. Where police are primarily enforcing public safety, not criminal law, no warrant or probable cause requirements are necessary
        1. Balance government interests with private interests
        2. Make sure there is a police policy that takes away officer discretion to stop (e.g., every third car is stopped)
        3. Minimize level of intrusion
    ii. Mixed motives are permissible
    iii. Pretextual roadblocks have been held unreasonable
    iv. Drug checkpoint alone is unreasonable because the primary purpose is enforcing criminal law

k. ADMINISTRATIVE SEARCHES
    i. Totality of the Circumstances AND
    ii. No warrant requirement
        1. Balance public interests against private interests

l. HOT PURSUIT – When in hot pursuit of a fleeing suspect. *United States v. Santana*, 427 U.S. 38, 42-43 (1976)

VIII. EXCLUSIONARY RULE
a. Prohibits the prosecutor from using illegally obtained evidence during a trial.
b. *Weeks v. U.S.*: established the exclusionary rule for federal prosecutions.
c. *Mapp v. Ohio*: Extended the exclusionary rule to the states.
d. Encompasses both "primary evidence obtained as a direct result of an illegal search or seizure" and "evidence later discovered and found to be derivative of an illegality," the so-called "'fruit of the poisonous tree.'" *Segura v. United States*, 468 U. S. 796, 804 (1984).

IX. EXCEPTIONS TO EXCLUSIONARY RULE
a. Independent Source Doctrine—If the search or seizure was independent from any violation of the Fourth Amendment, the evidence is admissible. *Murray v. United States*, 487 U.S. 533, 537 (1988).
b. Inevitable Discovery Exception—If the evidence inevitably would have been discovered by lawful means, the evidence is admissible. *Nix v. Williams*, 467 U.S. 431, 443-444 (1984).
c. Attenuation Exception – Whether the causal chain has been broken by intervening circumstances. A three-factor test.
    i. The "temporal proximity" of the unlawful detention and the discovery of incriminating evidence,
    ii. The presence of "intervening circumstances," and
    iii. The "purpose and flagrancy" of the official misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).
d. Good Faith Exception
    i. Good faith, reasonable reliance, on a defective warrant issued by a neutral magistrate, the exclusionary rule does not apply. *Illinois v. Krull; U.S. v. Leon*.
    ii. Exceptions
        1. Misleading evidence
        2. Magistrate is not neutral
        3. Police submit clearly insufficient affidavit
        4. Warrant is facially deficient

X. STANDING TO CHALLENGE FOURTH AMENDMENT VIOLATIONS
a. Search: Whether defendant had a legitimate expectation of privacy in the place searched
    i. Totality of the circumstances
        1. Relationship between owner and defendant
        2. Time spent at place searched
b. Seizure—Whether defendant had an individual property or possessory interests in the thing seized

FIFTH AMENDMENT

I. GENERAL

a. No person shall be compelled in a criminal case to be a witness against himself
b. The Fifth Amendment protects only against compelled disclosure of *testimonial* evidence. If evidence is non-testimonial, the Government can compel its production
    i. Express or implied assertion of fact that could be true or false subjects a witness to the cruel punishment for truth, falsity, or silence
    ii. Witness can be compelled to produce
        1. DNA evidence, photo lineups, fingerprints, handwriting samples, blood, and speech comparisons if probative effect of comparisons must be the comparison, NOT the actual words spoken
c. Immunity takes away the Fifth Amendment Privilege
    i. Transactional immunity is a complete bar to any future prosecution of the person who is granted immunity
    ii. Use immunity is not a complete bar to any future prosecution of the person who is granted immunity, but bars the prosecution from using the immunized testimony against the person

II. CONFESSIONS AND DUE PROCESS CLAUSE

a. Due process clause under the Fifth Amendment is used to exclude confessions where, under the totality of the circumstances, the defendant involuntarily confessed
    i. False documentary evidence is per se impermissible
    ii. Confessions derived from promises of consideration by the police will be excluded IF
        1. Police have no authority to give leniency
        2. The leniency is unreasonable
    iii. Police misconduct controls, not the defendant's state of mind

III. CONFESSIONS AND MIRANDA

a. If a suspect is in custody and the police are interrogating him, the police must first tell him:
    i. You have the right to remain silent.
    ii. Anything you say can and will be used against you in an court of law.
    iii. You have the right to talk to a lawyer and have him/her present with you while you are being questioned.
    iv. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

b. CUSTODIAL INTERROGATION
    i. Custody
        1. Whether, under the totality of the circumstances, the suspect has been deprived of his freedom of action in any significant way (free to leave)
        2. Federal: A formal arrest or restraint of freedom of movement of the degree associated with formal arrest. *Berkemer v. McCarty* (1984).
            a. Two prong test:
                i. What were the circumstances surrounding the interrogation; and,
                ii. Given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. *Thompson v. Keohane* (1995).
        3. Utah: four factors in determining when a person is in custody:
            a. The site of interrogation;
            b. Whether the investigation focused on the accused;
            c. Whether the objective indicia of arrest were present; and
            d. The length and form of interrogation. State v. Mirquet, 814 P.2d 1144, 1147 (Utah 1996).
    ii. Interrogation
        1. Express (accusatory) questioning OR
        2. Functional equivalent of express questioning
            a. And incorporates any words or police action which the police should know is reasonably likely to elicit an incriminating response from this suspect. *Rhode Island v. Innis* (1980)
            b. The test is an objective one. . . The focus is on the perceptions of a reasonable person in the suspect's position rather than the intent of the investigating officer

c. Does NOT Apply: (1) spontaneous statements, (2) routine booking questions, or (3) allowing, but listening to, conversation with spouse.

iii. Rule 616 Utah Rules of Evidence

1. "Except as otherwise provided in Subsection (c) of this rule, evidence of a statement made by the defendant during a custodial interrogation in a place of detention shall not be admitted against the defendant in a felony criminal prosecution unless an electronic recording of the statement was made and is available at trial. This requirement is in addition to, and does not diminish, any other requirement regarding the admissibility of a person's statements."
    a. There are exceptions and procedures to determine admissibility in the Rule.

c. EXCEPTIONS TO MIRANDA WARNINGS

i. Public Safety/Emergency exception applies where, under the totality of the circumstances, danger to the public outweighs the defendant's Fifth Amendment rights. Questioning to obtain information regarding active threat to public safety. New York v. Quarles, 467 U.S. 649 (1984).

ii. More compulsion is generally tolerated in such circumstances although not freely admitted by the court

d. WAIVER OF MIRANDA WARNINGS GENERALLY

i. Knowing AND voluntary waiver of rights

1. Knowing—Full awareness of nature of the right AND consequences of abandoning such right
2. Voluntary—product of a free and deliberate choice. *Dickerson v. U.S.* 530 U.S. 428 (2000).
    a. Looked at under totality of the circumstances, including the suspect's age, education, mental and physical condition, setting of the interrogation, duration, and manner of interrogation.
    b. *State v. Rettneberger* 984 P.2d 1009 (Utah 1999): two step voluntariness inquiry:
        i. 1. Whether the police conduct was objectively coercive, and
        ii. 2. Whether the Defendant's will was overborne.
        iii. Factors: defendant's mental health, mental deficiency, emotional instability, education, age, familiarity with the judicial system, police conduct, the duration of interrogation, persistence of officers, police trickery, absence of family and counsel, and threats or promises made to the defendant.

ii. Silence is not enough to constitute a valid waiver

e. WAIVER AFTER INVOCATION OF MIRANDA RIGHTS

i. Whether, under the totality of the circumstances, the police scrupulously honored defendant's invocation of Miranda rights. *Michigan v. Mosley*.

ii. Right to Silence—police may continue to interrogate UNTIL defendant makes an express, unequivocal statement that the right to silence is being invoked

iii. Right to an Attorney—once the right to an attorney is invoked, police must stop interrogation unless the communication is initiated by the suspect

f. Impeachment: statements, though not admissible during the case-in-chief, may be used to impeach a Defendant's testimony if he takes the stand at trial. *Harris v. New York* (1971). Not for other witnesses, James v. Illinois (1990)

g. Non-testimonial Fruits: Miranda's protection against compelled self-incrimination, does not apply to physical evidence discovered as a result of un-mirandized statement. *United States v. Patane* (2004).

SUPPRESSION HEARING
TIPS

1. PREPARING YOUR RESPONSE
    a. List Defendant's points into categories.
    b. Look up the case law
        i. Context of quoted laws
        ii. Verifying quoted laws are current
2. Carefully watch videos or listen to audio of event.
    a. Note words said and times, number of officers present, locations, timing, conduct
        i. Make sure can play recordings at hearing
        ii. Do not waive hearing
3. Get a copy of the preliminary hearing recording or transcript to prepare fact statement
    a. Note important facts officer made regarding the suppression issues
4. Review Police Report
    a. Do fact statements differ from preliminary hearing?
    b. Prepare questions to interview officer.
        i. If not face to face, call them
5. Interview officer(s)
6. Prepare your response
    a. Make a detailed statement of the facts
        i. Support them with the transcript of the preliminary hearing or with evidence you will be using at the Suppression Hearing.
    b. Challenge Defendant's expectation of privacy.
        i. It is the defendant's burden to put on evidence to prove he had an expectation of privacy if you affirmatively raise it.
    c. Broaden the scope of the issues
        i. Totality of the circumstances
        ii. Start at the beginning of the encounter (or before if dispatched there)
    d. Provide alternate reasons to support
    i. Objective standard, so it may even be something the officer didn't think of.
        ii. Provides the appellate courts alternate reasons to support officer's actions.
            1. *State v. Strieff* was ruled on alternate grounds
            2. *State ex rel. M.V*. 1999 UT 104 was affirmed on prosecutor's alternative inevitable discovery argument.
        iii. If the court suppresses, you have created a record of alternate grounds for appellate review
7. Do not waive a suppression hearing.
    a. It has a different purpose than a preliminary hearing
        i. Credibility is an important factor at a suppression hearing
        ii. Much more detailed than preliminary hearing
8. Prepare for the hearing
    a. Outline your argument
        i. Key legal points
        ii. Facts which support
        iii. Cases which support with one line sentence reminders of case and law
        iv. Bring copies of most important cases (3 copies: one for you, one for court, one for defense counsel).
            1. If you highlight any portions for court, highlight the same portions for counsel.
    b. Review with officer
        i. Inform officer of the defendant's argument
            1. Consider emailing or providing officer with memoranda
            2. Ask if anything have wrong
        ii. Inform officer of the applicable law
        iii. Ask your prepared questions to see what officer's response is
            1. Do not "coach" but you may teach
            2. Instruct them to tell the truth
    c. Prepare a list of witnesses you need for the hearing
        i. Make sure they are subpoenaed
        ii.

9. At the hearing
    a. Moving party may make preliminary statement and then you
    b. Order of evidence
        i. If you affirmatively contested the defendant's standing, then defendant presents evidence to establish standing first.
            1. If you do not contest defendant's standing, then you present evidence first.
        ii. If it is a warrantless search and seizure, you present evidence first.
            1. If defendant is challenging the warrant, he presents evidence first to overcome presumption of a valid warrant.
    c. Create a record
        i. Take time for officer to discuss his experience on the record. For example:
            1. Terry Frisk: get concerns about officer safety and experience on the record
            2. Plain smell: Officer's special familiarity with how controlled substances smell is germane to evaluating whether an officer had PC to search and seize. State v. Wright, 1999 UT App. 86
            3. State v. Poole, officer's experience with hidden compartments gave RS/PC
        ii. Get as detailed as possible.
            1. Remind judge that you have the burden and the testimony is important for a totality of the circumstances analysis.
    d. At the close
        i. Moving party argues first and has final rebuttal.
    e. Ruling
        i. The court may rule at the hearing or take under advisement
            1. If the court rules from the bench but does not include all of the significant facts or legal conclusions, remind the court of the pertinent facts and ask for a determination.
            2. Also may ask to rule on all the legal theories.
        ii. If the judge rules from the bench, you may want to offer to write the proposed order.
    f. Order
        i. If the court did not rule on all issues, you may ask for a supplemental ruling and incorporate it into the findings.
        ii. Credibility findings should be included. Judges' credibility findings are given deference.